Filed 5/15/09 P. v. Stupin CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RONALD A. STUPIN, Defendant and Appellant.	B207083 (Los Angeles County Super. Ct. No. GA065304)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mildred Escobedo, Judge. Affirmed.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Kenneth C. Byrne and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Ronald Stupin was convicted, following a jury trial, of the second degree murder of Albert Pineiro in violation of Penal Code section 187, subdivision (a). The jury found true the allegations that appellant used a firearm in the commission of the crimes within the meaning of section 12022.53, subdivisions (b), (c) and (d). The trial court sentenced appellant to a total of 40 years to life in state prison.

Appellant appeals from the judgment of conviction, contending that the trial court erred in failing to instruct the jury on heat of passion voluntary manslaughter. Appellant further contends that the trial court's use of CALCRIM No. 3517, instructing the jury on completing verdict forms, lessened the prosecutor's burden of proof. We affirm the judgment of conviction.

Facts

In April 2006, 64-year-old appellant lived with his mother Nadja Stupin in her house in Monterey Park. He had lived there for about 20 years. Ms. Stupin had congestive heart failure and chronic obstructive pulmonary disorder. According to her daughter Karen Pineiro, Ms. Stupin needed constant care. Karen had powers of attorney for her mother, and decided to move her to an assisted living home.[1] Karen planned to sell her mother's house to pay for her mother's care.

Karen discussed the sale of the house with appellant, her brother, several times before April. She agreed that he could stay in the house until his birthday in July, when he would be eligible for Social Security.

On April 8, Ms. Stupin's sister, who had been temporarily caring for Stupin, was unable to do so any more. Karen and her husband Albert Pineiro came to the house, picked up Ms. Stupin and took her on a tour of an assisted living facility. They then brought Ms. Stupin to stay at their house. At around that same time, Karen told appellant that an appraiser would be coming the following week, on Tuesday, April 11.

---

[1] Stupin executed the powers of attorney in 1999 and 2006.

On Monday, April 10, appellant went to the Monterey Park Police Department and told Officer Jimenez that he was concerned that his sister was getting an appraisal on his mother's house because she intended to sell the house with his mother's consent. The officer told appellant that an appraisal was not enough to sell the house, and suggested that appellant call the police if an appraiser came to the house, so that police could attempt to determine what was happening. Appellant said he would call. He did not tell Officer Jimenez that he was afraid of the Pineiros.

On April 11, the appraiser called Karen and said that appellant was pacing back and forth in front of the house. Karen called police and asked for an officer to come to the house to keep the peace. Karen parked to wait for police.

Albert arrived in a separate car. He intended to act as a liaison with appellant and to help calm the situation. Karen told him what had happened. Albert said he would go to the house to tell appellant that Karen and the appraiser were coming.

Karen saw appellant pacing in the driveway. Albert walked up the driveway. Appellant walked out from the garage door. Albert's hands went up. Karen thought he was going to shake hands with appellant. She heard a gunshot and saw Albert fall back. Appellant then walked away toward the kitchen door. Karen had not known that appellant owned any guns. She called police again.

Inside the house, appellant called 911. In the call, which was played for the jury, appellant stated that he shot Albert because "[t]hey want to sell our house."

A neighbor across the street heard the gunshot and called 911. She saw police arrive and appellant come out of his house with his hands up. Appellant seemed very calm.

Albert died of his gunshot wound. The gun was about 18 to 24 inches from his arm when he was shot in the chest. Police recovered a rifle with an expended casing from the front closet of the house. A box of ammunition was found in appellant's bedroom.

Appellant testified in his own defense at trial. He stated that his mother generally took care of herself, but he was there to help if needed. Appellant described his

relationship with Albert as "rocky" and "unstable." They sometimes argued. On one occasion, appellant made a joke about Albert's weight, and Albert "smashed" him against a wall. Albert was about 100 pounds heavier than appellant. On another occasion, appellant told Albert to leave the kitchen, and Albert hit him with a utensil. Appellant could not remember exactly when these incidents took place, but it was within a year of the shooting.

According to appellant, the Pineiros picked up his mother on Saturday the 8th without telling appellant. On Monday the 10th, appellant and Karen had an unpleasant telephone call. Appellant believed that he might need to protect himself from Albert. Appellant got his rifle and kept it by his bed in case Albert came to the house that night to kick him out. He also put up a "Keep Out" sign to prevent Karen or an assessor from coming to the house. He put a lock on the gate that led to the back door. Appellant also went to the police station and spoke to a police officer.

On April 11, appellant was expecting Karen to bring an "IOU" to the house allowing him to live there until his next birthday. He was not expecting Albert to come to the house.

At some point in the morning, appellant saw Albert drive by the house and park. Appellant got his rifle to scare Albert. Albert walked to the front gate with the sign on it. Appellant walked out the front door, holding the rifle vertically in his hand. Albert looked at appellant and "charged" or "lunged" at him. Albert raised his hands and made a fist. Appellant was afraid that Albert would overpower him and shoot him with his own gun. Appellant waited until Albert got close, then fired the rifle and hit him. Appellant then went back inside and called 911. Appellant denied that he was "heated up" or angry.

Discussion

1. Voluntary manslaughter

The trial court instructed the jury on the lesser included offense of voluntary manslaughter committed in the honest but unreasonable belief in the need for self-defense. Appellant contends that the trial court erred in failing to also instruct the jury on

the lesser included offense of voluntary manslaughter committed in the heat of passion. We see no error.

"[A] trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." (*People* v. *Birks* (1998) 19 Cal.4th 108, 118.)[2] A defendant is entitled to an instruction on a lesser included offense only if there is evidence which, if accepted by the trier of fact would absolve the defendant from guilt of the greater offense but not the lesser. (*People* v. *Lopez* (1998) 19 Cal.4th 282, 288.)

Voluntary manslaughter is a lesser included offense of murder. (*People* v. *Lee* (1999) 20 Cal.4th 47, 58-59.) To reduce a charge from murder to voluntary manslaughter, it must be affirmatively shown that a defendant was subjectively in the heat of passion at the time of the killing and that such a passion "'would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances.'" (*People* v. *Steele* (2002) 27 Cal.4th 1230, 1252-1253.) To satisfy the objective element of voluntary manslaughter, the defendant's heat of passion must be due to provocation by the victim. (*Id*. at p. 1253.) The victim's conduct "must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*People* v. *Lee, supra*, 20 Cal.4th at p. 59.)

Here, there is no substantial evidence that appellant was actually under the heat of passion when he shot Albert. At trial, appellant testified about his emotions both before the day of the shooting and on it. He admitted to feeling a little angry, but described it as

---

[2] The duty to instruct as to all theories of a lesser included offense that are supported by the evidence is a sua sponte duty; a defendant's claim of error is not forfeited by the failure to request the instruction in the trial court. (*People* v. *Whisenhunt* (2008) 44 Cal.4th 174, 216-217.)

a minor emotion.[3] A minor feeling of anger does not amount to heat of passion. Appellant testified that when Albert came to the house, appellant was afraid that Albert would overpower him, get the rifle and shoot him with his own gun. This is essentially a claim of self-defense, and the jury was instructed on both self-defense and voluntary manslaughter under an unreasonable self-defense theory.

Appellant described his thought processes *after* the supposed provocation of Albert moving toward him. Appellant: "Well, he had the – he still had a chance to leave because he was behind the trailer had to get around it, but so I just waited. And then he kept coming close. He wasn't – he wasn't trying to leave. He was coming toward me." Appellant's attorney: "What did you think he was going to do?" Appellant replied: "Now I had to think how close should I let him get before he could overpower me. I had to make that decision." Appellant's attorney: "Okay. What did you do?" Appellant: "Well, he was – he was still coming in my direction. Now, he's getting close, so I level the rifle on him, I had my finger on the trigger." Appellant's attorney: "And what happened?" Appellant: "Now, he didn't raise his hand. He had his hands –." Appellant's attorney: "Okay. What happened after you leveled the rifle?" Appellant: "I shot him."

---

[3] On cross-examination, appellant was asked if he was angry on Saturday. He replied: "Mostly scared and surprised." He later testified: "I didn't want to leave the house. It was scary." The prosecutor asked: "And you were angry about that?" Appellant replied: "No." He added that: "[Y]ou can't say I was scared without even being a little angry." Appellant later testified: "I can't deny that if a person is scared, can he say he's not even a little bit angry."

These are not the thoughts of a person who is acting rashly or without due deliberation and reflection.[4]

Moreover, there is nothing in the surrounding circumstances which suggests heat of passion. A neighbor testified that it was very quiet before the gunshot and that appellant appeared calm when police arrived to arrest him. (Compare *People* v. *Wickersham* (1982) 32 Cal.3d 307, 327 [evidence that defendant was hysterical and her statements were unintelligible immediately after the shooting showed that she was subjectively in the heat of passion].)

Further, there was no substantial evidence of adequate provocation which would arouse the heat of passion of an ordinarily reasonable person.

Appellant contends that there was "accumulated provocation" which caused him to explode when Albert lunged at him. He contends that tension had been building between the two men for months. Appellant states that he and Albert did not get along well and often argued. He describes two incidents in which Albert responded to appellant's statement with physical violence. Appellant was unable to give dates for these incidents. He would only say that they occurred within a year of the shooting.

Appellant also points to several incidents related to his mother's care and the related sale of the house which he contends were provocation. These incidents include an argument on Friday, the Pineiros' unannounced decision to take Stupin to visit an assisted living facility on Saturday, and then to stay at the Pineiros' house, an "unpleasant" telephone call from Karen on Monday in which she informed appellant that she would be

---

[4] The prosecution offered rebuttal evidence that appellant told police that he was angry over the situation with the house and fearful about becoming homeless. When appellant saw Albert park his car, he knew Albert was going to come up to the house. He moved his rifle from the bedroom to a location near the front door because Albert "was going to bitch and I was going to let him have it." These thought processes are not those of a person whose reason is acting rashly or without due deliberation and reflection. Thus, appellant's statements in his police interview do not support an instruction on voluntary manslaughter.

visiting the house with an appraiser on Tuesday and Albert's unannounced arrival at the house on Tuesday.

At most, what appellant describes is a disagreement about how and where his elderly, ill mother should be cared for. Appellant believed that she could be cared for at home. His sister and brother-in-law, with whom he did not get along, believed that she needed to be cared for in an assisted-living facility. His mother had executed at least two powers of attorney giving her daughter the right to make decisions about her care. His sister exercised that right. This action does not rise to the level of provocation that would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.

2. Verdict Forms

Appellant contends that the trial court erred in using CALCRIM No. 3517 jury to explain how to complete the verdict forms. He claims that the instruction impermissibly lightened the prosecution's burden of proof. We do not agree.

Appellant points to the following sentence to support his claim: (1) "The People have the burden of proving that the defendant committed first degree murder rather than a lesser offense." Appellant contends that jurors might have understood this sentence as permitting conviction of a lesser offense simply because the jurors did not find the defendant guilty of the greater offense beyond a reasonable doubt.

When evaluating a claim that the jury could have misconstrued an instruction, we ask ""'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.'" (*People* v. *Raley* (1992) 2 Cal.4th 870, 901.) "Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation." (*People* v. *Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258.)

Our colleagues in the Third District Court of Appeal have rejected a similar claim in *People* v. *Holmes* (2007) 153 Cal.App.4th 539. We agree with our colleagues that focusing on one sentence in one instruction is not the correct way to analyze the

correctness of the instruction. The "'correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'" (*People* v. *Castillo* (1997) 16 Cal.4th 1009, 1016.)

Here, before jurors heard the above sentence from the instruction, they received detailed instructions which make it clear the People have the burden of proof on every offense. The instruction specifically states: "If you all agree that the defendant is not guilty of first degree murder, *but you agree the People have proved the killing was second degree murder*, you must do two things. First, complete the verdict form stating that the defendant is not guilty of first degree murder. Then, complete the verdict form stating that the defendant is guilty of second degree murder." (Italics added.) The instruction also explains that "If you all agree that the defendant is not guilty of first degree murder, *but you cannot all agree on whether or not the People have proved the defendant committed second degree murder*, then you must do two things." (Italics added.) First complete the not guilty verdict form for second degree murder, then "send a note reporting that you cannot all agree that second degree murder has been proved. *Do not complete any other verdict forms for this count*." (Italics added.) Thus, jurors were clearly instructed that they could only complete the guilty form for second degree murder if they believed that the People had met their burden of proving that offense.

Immediately after these detailed instructions is the paragraph which contains the sentence appellant complains of: "The People have the burden of proving that the defendant committed first degree murder rather than a lesser offense." The remainder of the paragraph provides: "If the People have not met this burden, you must find the defendant not guilty of first degree murder." This paragraph, read as whole, serves to remind the jurors that the prosecution must prove the defendant committed a specific crime before he could be found guilty of that specific crime.

Appellant makes a similar contention about the following sentence: "The People have the burden of proving that the defendant committed murder rather than a lesser offense." Since appellant was not convicted of the lesser offense of voluntary manslaughter, he could not have been prejudiced by this sentence. Were we to consider

the substance of appellant's claim, we would find that it had no merit, for the same reasons that we have explained above.

The jury was instructed: "If you all agree that the defendant is not guilty of first or second degree murder, *but you all agree that the People have proved* that he is guilty of voluntary manslaughter," then complete the verdict form stating that the defendant is guilty of voluntary manslaughter. (Italics added.) The jury was further instructed: "If you all agree the defendant is not guilty of first or second degree murder, *but you cannot all agree on whether or not the People have proved* the defendant committed voluntary manslaughter" then the jury should send a note reporting the juror's inability to agree on voluntary manslaughter. (Italics added.)

It was only after these detailed instructions that the jury heard the paragraph containing the complained of sentence: "The People have the burden of proving that the defendant committed murder rather than a lesser offense." The remainder of the paragraph provides: "If the People have not met this burden, you must find the defendant not guilty of murder."

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.